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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215087
Party	Defendant Peter J. Healy
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

UNITED STATES MARINE CORPS v. PETER J. HEALY	Opposition No. 91215087 Serial No. 85936128

DEFENDANT PETER J. HEALY'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF OPPOSITION

Applicant, Peter J. Healy ("Applicant") hereby opposes Plaintiff's Motion for Leave to File Amended Notice of Opposition ("Motion To Amend"). Plaintiff's Notion should be denied because Plaintiff delayed more than three and a half months after receiving the discovery responses used as a pretext for this vexatious Motion to Amend. Plaintiff's motion should be denied because Plaintiff has, in an obvious ploy bent on to circumvention of the 1st amendment prohibition against government suppression of speech content, filed the immediate action to litigiously hobble the commercial prospects of the subject trademark, and now having succeeded in that purpose to the degree that all progress in that commercialization has been suspended, seeks to amend and drag out that vexation, by resort to the Kafkaesque rational that progress toward commercialization has been insufficient.

MEMORANDUM OF POINTS AND AUTHORITIES

A motion to amend a Notice of Opposition may be denied when the amendment would be prejudicial to the opposing party, where there has been bad faith on the part of the moving party, or when the amendment would be futile. Matrix Capital Management

was having nothing of that. So now, since Plaintiff counsel would had little chance of success in forthrightly pleading for a discovery do-over, Plaintiff instead seeks leave to amend first.

PLAINTIFF CITES NO SOURCE OF KNOWLEDGE ABOUT THE VIDEO GAME BUSINESS WHATSOEVER

Plaintiff cites no source of knowledge about the fast evolving, capital intensive video game industry, in support of Plaintiff's ignorantly speculative supposition that some type of piecemeal, low (to no) budget production and marketing should be done in the absence of project funding. Swatch A.G. v. B. Z. Berger is inapposite. Plaintiff doesn't even attempt to explain how the typically product development cycle in the watch business is an appropriate analog for the video game production cycle.

CONCLUSION

Based on the foregoing Applicant Peter J. Healy hereby requests that the Board deny Opposer's Motion for Leave to Amend the Pleadings; Leave to file a First Amended Notice of Opposition. Plaintiff's sought amendments to the pleadings threaten substantial prejudiced to Applicant, are untimely, and in bad faith. In addition, the proposed amendment would be an exercise in futility, given that newly raised ground for opposition—lack of progress in commercial exploitation—is a patently self fulfilling absurdity perpetrated by Plaintiff itself.

Respectfully submitted

May 19, 2015

Peter J. Healy, Applicant and Defendant
PO Box 1523, Morro Bay, CA 93443

Fund, LP v. BearingPoint, Inc., 576 F 3d 172, 193 (4th Cir 2009); Alonso v. McAllister Towing of Charleston, Inc.. 595 F.Supp.2d 645, 648 (D.S.C. 2009)

APPLICANT/DEFENDANT IS PREJUDICED BY TIMING OF ATTEMPTED AMENDMENT

Whether an amendment would be prejudicial is often determined by the nature of the amendment and its timing. Laber v. Harvey, 438 F.3d 404, 427 (4th Cir. 2006). A common example of a prejudicial amendment is one that "raises a new legal theory what will require the gathering and analysis of facts not already considered by the [defendant, and] is offered shortly before or during trial." Johnson v. Oroweat Foods Co., 785 F.2d 503 (4th Cir. 1986). An amendment is not prejudicial, by contrast, if it merely adds to an additional theory of recovery to the facts plead and is offered before any discovery has occurred. Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980)

This matter has been pending since February, 2014. The matter is hardly nearing the end of the discovery period—DISCOVERY IS CLOSED. Discovery is not only closed—discovery had been closed for three month by the time Plaintiff got around to filing its Motion to Amend. Meanwhile Applicant, is dead in the water, so to speak, in as much as his trademark is encumbered. Clearly the Applicant is highly prejudiced by Opposer's gambit to seek leave to amend, both because Opposer has squandered a substantial amount of time since undeniably knowing, by way of date certain discovery responses, the allegedly facts being argued in support of sought leave to amendment, and because the very basis upon which amendment is sought, highlights the fact that the Applicant is greatly hampered in developing the commercial potential of the subject mark

As factually substantiated, by virtue of Appicant's Declaration in support of this Opposition, Plaintiff counsel has been on notice for more than nine months of Applicant's stated determination that access to potential investors in the highly capital intensive video game industry will not be squandered with a game trademark still encumbered by litigation. Applicant directly informed Plaintiff counsel, Mr. Green, that game development required substantial investment, and that such investment would not be deemed prudent until Applicant had overcome Plaintiff's attempt to suppress the subject trademark.

PLAINTIFF PRETEXT FOR AMENDMENT IS ABSURD
PLAINTIFF ALLEGES LACK OF COMMERCIAL USE AS PRETEXT
AT SAME TIME – PLAINTIFF SEEKS APPLICATION DENIAL
TOWARD THE STATED PURPOSE OF PRECLUDING COMMERCIAL USE

In response to any and all discovery requests from Applicant, Plaintiff never indicated an intent to use the subject mark commercially. In fact, Plaintiff has argued that Defendant's application should be denied, in order that the subject trademark never see the light of day, least it cast doubt on the infallibility of Plaintiff's personnel. Now Plaintiff uses as a pretext for such a late filed Notice of Leave to Amendment, that Applicant has not been using the mark publicly enough? If irony were a gymnastics routine, Plaintiff would be scoring perfect 10's throughout its Motion to Amend.

PLAINTIFF APPARENTLY WANT TO REOPEN DISCOVERY
TO HAVE ANOTHER BITE AT THE APPLE

Incident to filing the immediate Motion to Amend, Plaintiff invited Applicant to stipulate to the reopening of discovery. Interestingly, in suggesting that discovery be reopened, Plaintiff counsel never mentioned what apparent lack of prior diligence in conducting discovery that Plaintiff counsel was belatedly maneuvering to cure. Applicant

was having nothing of that. So now, since Plaintiff counsel would had little chance of success in forthrightly pleading for a discovery do-over, Plaintiff instead seeks leave to amend first.

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Respectfully submitted

May 19, 2015

Peter J. Healy, Applicant and Defendant
PO Box 1523, Morro Bay, CA 93443

CERTIFICATE OF SERVICE

I hereby certify that the foregoing OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND PLEADINGS, AND SUPPORTING DECLARATION OF PETER J. HEALY, was served on this 19st day of April, 2014, by postage prepaid first-class mail, from Sacramento, California, to the following:

Counsel for Opposer and Plaintiff:

Mr. Philip Greene
Associate Counsel (Trademark)
U.S. Marine Corps
3000 Marine Corps Pentagon
Office of the Counsel for the Commandant
Room 4B548, The Pentagon
Washington, DC 20350-3000

May 19, 2014

Peter J. Healy, Applicant and Defendant
PO Box 1523, Morro Bay, CA 93443

DECLARATION OF PETER J. HEALY

IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF OPPOSITION

I, Peter J. Healy, am the named Applicant in trademark application serial No. 85936128, and the Defendant in subsequent Opposition to it, No. 91215087. I am an attorney licensed in good standing in the State of California. The following facts are true, to the best of my knowledge, after reasonably diligent investigation:

During a telephonic conversation between myself and counsel of record for Plaintiff in Opposition no. 91215087, Mr. Philip Green, more than nine months prior to the date of this declaration, I apprised Mr. Green of my assessment that it would not be viable to go forward with commercial development of the subject video game for which subject trademark "Marine One Down" would be the trademarked brand name, until the brand name trademark was clear of the encumbering taint of the Opposition No. 91215087 litigation.

It is my understanding and belief that conceptually evocative and uniquely memorable video game branding be a significant factor in the commercial viability of a video game property. I believe that "Marine One Down" is an example of just such a commercially viable video game brand name.

Based on my knowledge of how capital intensive video game production is in 2015, with many games consuming production budgets comparable to, or exceeding, those of studio feature films, gaining the interest among the limited number of prospective investors able and willing to fund video game production, is critical to embarking on an adequately funded project. At the same time there is an intangible, intuitive aspect to assessing the quality and commercial potential of video game creative

premises, and associate branding, and intuitive assessment which often occurs, in large part, when a potential investor is first introduced to that video game proposal. If the branding aspect of that proposal is tied up in vexatious litigation at that point of introduction, it can irreparable sour that potential investor's perspective toward it. It is on the basis of the foregoing and other commercial calculations, some of them proprietary, that Applicant has not yet sought to publicly market the subject mark.

There is also a concern, that in the midst of capital intensive video game development and production, with responsible management of project funding dependent upon momentum and progress toward completion benchmarks—Plaintiff would be true to their stated purpose, and seek an injunction to push the project into insolvency.

In addition, as to the purported concern of Plaintiff that Applicant is squandering the trademark by not actually intending to use it—of all the discovery responses received for Plaintiff, and all communications with Plaintiff counsel, not once has there been the slightest indication that Plaintiff had any intention of ever using the subject mark in commerce—not a hint, not once.

I, Peter J. Healy, affirm under penalty of perjury under the laws of the United States of American, that the foregoing is true and correct to the best of my knowledge.

Date: May 19, 2015

Peter J. Healy Applicant, (No. 85936128)